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# SEEING TORT LAW FROM THE INTERNAL POINT OF VIEW: HOLMES AND HART ON LEGAL DUTIES

*John C.P. Goldberg\* & Benjamin C. Zipursky\*\**

## INTRODUCTION

It is common for law professors to divide scholarship on a given subject into opposing methodological camps. In tort, the most familiar divide today is that between the law-and-economics camp that focuses on efficient deterrence, and the philosophical camp that tends to focus on corrective justice. There is another divide, however, that is at least as fundamental and that cuts across this distinction. It is between duty-skeptical and duty-accepting theories of tort.<sup>1</sup> A familiar instantiation of this cleavage is the long-standing debate concerning the independence and intelligibility of the duty element of the negligence cause of action.<sup>2</sup> But this debate is part of a broader dispute as to whether tort law is best conceptualized as a scheme of liability rules or guidance rules.<sup>3</sup>

On the liability-rule view, tort law sets standards for when one person or entity can be ordered by a judge to bear the losses of another. The justifications identified for this loss reallocation vary: Efficiency, fairness, and other considerations might be invoked. Yet in all its variants, liability-rule tort theory embraces the notion that tort is about allocating losses and concomitantly rejects the idea that the payment of damages in a tort case is an instance of an injurer being held to account for having breached an obligation to conduct herself in certain ways toward the victim. The latter idea, by contrast, is at the core of guidance-rule conceptions of tort. On this

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1. See Nicholas J. McBride, *Duties of Care—Do They Really Exist?*, 24 O.J.L.S. 417 (2004). McBride describes the divide as between “cynics” and “idealists.” *Id.* at 418-19. We refrain from adopting his terminology in part because, in our view, the label “idealists” only aids duty skepticism by linking duty acceptance to overly moralistic, squishy, and esoteric ways of thinking. Likewise, we have qualms about defining the issue at hand as whether duties “really exist,” given that this sort of locution tends to link duty acceptance to strong metaphysical claims about which duty skeptics are justifiably skeptical.

2. See John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of MacPherson*, 146 U. Pa. L. Rev. 1733, 1745-66, 1799-1846 (1998) (discussing and responding to duty skeptics’ deconstruction of the duty element of negligence).

3. See generally Dale A. Nance, *Guidance Rules and Enforcement Rules: A Better View of the Cathedral*, 83 Va. L. Rev. 837 (1997) (contrasting liability-rule and guidance-rule conceptions of law).

understanding, tort is a collection of “dos” and “don’ts”: It mandates how we are obligated to act with regard to the interests of others and provides persons who are victimized by breaches of these obligations with the ability to obtain satisfaction, through law, for having been mistreated. Although guidance-rule conceptions of tort lend themselves naturally to certain rights-based accounts of tort law, they are not limited to such accounts. For example, a “post-Chicago-School” economist who takes social norms seriously can adopt a guidance-rule conception of tort law that nonetheless maintains that efficient deterrence is the ultimate justification for having such rules.<sup>4</sup>

In elaborating this divide within the world of tort scholarship, this essay develops three main points. First, it argues that, as represented by the groundbreaking work of Holmes,<sup>5</sup> liability-rule, duty-skeptical accounts of tort tend to be fueled by an understandable but nonetheless excessive reaction to a naively moralistic version of what it means for tort law to be a law of genuine duties. Second, it argues that, overwhelmingly, modern mainstream American tort scholarship is “Holmesian” in embracing duty skepticism and the implications of that skepticism. Third, it claims that H.L.A. Hart’s celebrated critique of Holmes’s jurisprudential deconstruction of legal duties—particularly Hart’s account of the “internal aspect” of rules—provides a duty-accepting jurisprudence that is more satisfactory than its duty-skeptical counterparts, yet still sensitive to skeptics’ legitimate worries about naïve accounts of legal duties.<sup>6</sup> In short, Hart’s critique of Holmes and his resuscitation of the notion of legal obligation undercuts much of the impetus for duty skepticism in tort, and conversely provides a basis for duty-accepting, guidance-rule theories of tort.

## I. HOLMES’S GAMBIT: REDEFINING DUTY AND REINVENTING TORT LAW

### A. *Setting the Stage*

Holmes is justly famous for being among the first to construct a theory of tort law that self-consciously attempts to account for the central place in modern tort law of accidents causing physical injury.<sup>7</sup> He is equally

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4. See, e.g., Robert Cooter, *The Intrinsic Value of Obeying a Law: Economic Analysis of the Internal Viewpoint*, 75 Fordham L. Rev. 1275 (2006).

5. See generally Oliver Wendell Holmes, Jr., *The Common Law* (Little, Brown, & Co. 1945) (1881) [hereinafter *Holmes, The Common Law*]; Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457 (1897) [hereinafter *Holmes, Path of the Law*].

6. See generally H.L.A. Hart, *The Concept of Law* (2d ed. 1994). Hart, of course, self-identified as a legal positivist who was attempting to improve upon what he took to be cruder versions of positivism offered by the likes of Austin and Holmes. For what it is worth, we do not think of ourselves as positivists, in part because we do not believe that one needs to subscribe to legal positivism in order to treat law as a partly autonomous realm of powers, rights, privileges, and duties.

7. See Thomas C. Grey, *Accidental Torts*, 54 Vand. L. Rev. 1225 (2001).

famous for articulating a vigorously amoralistic conception of law personified by the figure of the “bad man.”<sup>8</sup> That Holmes jointly pursued these two projects (among others) is a testament to his intellectual ambition and virtuosity, for the received thinking about law generally, and tort law in particular, was inhospitable to his theoretical ambitions.

First, tort and its historical antecedents were (as tort still is) rife with concepts that link it to notions of morality. The medieval progenitor of tort—the older notion of a “trespass”—linked tort to biblical notions of sin and transgression.<sup>9</sup> Later writers including John Locke and William Blackstone had categorized actions brought under these writs as comprising the category of “private wrongs.”<sup>10</sup> A doctor who provided incompetent medical services to his patient, in the process causing her harm, is a doctor who, under the law of the writ system, had committed against his patient the private wrong of malpractice.

Second, the trespass or tort actions of Holmes’s day purported to be (as tort actions still purport to be) fundamentally about obligatory conduct. As the malpractice example suggests, tort verdicts, judgments, and opinions have long contained (and continue to contain) words and phrases that, when taken at face value, offer prescriptions as to how one must conduct oneself in relation to certain facets of others’ well-being. These facets of individual well-being were linked by pre-Holmesian writers to core individual rights, such as the right to bodily integrity, the right to liberty, the right to own property, and the right to one’s good name.<sup>11</sup> Thus, a trespass action for battery was described as vindicating the right to bodily integrity by proscribing a purposeful touching of one by another, at least absent indicia of permission. Likewise, cases that would today fall under the heading of negligence instructed that one must act with reasonable care for the physical well-being of certain others. Defamation cases specified that a person must not publish statements about another of a sort that tends to injure another’s good name. Nuisance cases indicated that one is ordinarily obligated not to use one’s own property in a manner that generates an ongoing and unreasonable interference with another’s enjoyment of his property. In sum, the law of torts was understood by the likes of Blackstone to house directives that are rooted in basic rights and that give rise to relational legal duties specifying various ways in which one is actually obligated to behave *toward* others in light of others’ basic interests. They further understood tort causes of actions for damages as recognition in law of the right holder’s entitlement to have recourse against a person who

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8. See generally *The Path of the Law and Its Influence: The Legacy of Oliver Wendell Holmes, Jr.* (Steven J. Burton ed., 2000) (essays on Holmes’s jurisprudence).

9. See John C.P. Goldberg, Anthony J. Sebok & Benjamin C. Zipursky, *Tort Law: Responsibilities and Redress*, at app. A (2004).

10. See John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 Yale L.J. 524, 531-59 (2005). Private wrongs were also referred to as “civil injuries,” where the term “injuries” was understood to refer to mistreatments or wrongings, as opposed simply to setbacks or losses. *Id.* at 542-43.

11. *Id.* at 545-51.

has done him wrong.<sup>12</sup> In other words, the plaintiff's membership in the class of beneficiaries to whom the defendant's duty was owed earned the plaintiff standing to complain when the defendant engaged in conduct constituting a breach of that duty.

Third, tort law was (as it still is) primarily common law. The prescriptions that it issues were not to be found in a code of conduct comparable to the official rulebook of a sport. Instead, they had to be teased out of judicial opinions that at times sent subtle or ambiguous messages about exactly how one was supposed to behave toward others. These rules, moreover, changed over time, sometimes incrementally, sometimes abruptly, and often without the sort of notice or buildup associated with legislation or regulation. Yet they also purported in some way to track custom—prevailing practices, norms, and sensibilities.

These three features of the law of private wrongs ran headlong into what turn out to be three of the main props of Holmes's approach to jurisprudence and tort law. Indeed, Holmes seems to have developed them in reaction to those features. The first was his insistence on the distinctiveness of legal and moral concepts.<sup>13</sup> The second was Holmes's claim that an actor's being under a legal duty means only that, if the actor behaves in certain ways, he faces the possibility of being subjected by a judge (qua agent of the state) to "disagreeable consequences."<sup>14</sup> The third was his abiding concern that modern law give clear notice to persons of their prospects for being made to suffer such consequences.<sup>15</sup> It is a measure of Holmes's confidence and success that, in each of these respects, he attacked conventional thinking about tort law head-on and, in the process, turned academic thinking about law on its head.

Our claim in this part is that this project was at once well motivated and poorly executed. Holmes deserves credit for launching a campaign to drive a wedge between moral wrongs and legal wrongs in law generally and tort particularly. Regrettably, however, his strategy for carrying it out was to insist, unnecessarily and problematically, on collapsing the idea of legal duty into the idea of threat of sanction.

### B. *Holmes on Torts*

In taking on the challenges we have described, Holmes had assistance from John Austin (and perhaps Jeremy Bentham as well).<sup>16</sup> As noted above, one way to understand how writers like Blackstone thought about

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12. *Id.*

13. See Holmes, *Path of the Law*, *supra* note 5, at 459.

14. *Id.* at 461.

15. *Id.* at 94-95, 111 (emphasizing that tort law must give notice and the opportunity for choice to those subject to it).

16. 1 John Austin, *Lectures on Jurisprudence* §§ 577-95, at 278-84 (Robert Campbell ed., London, John Murray 3d ed. 1869) (1861). The ensuing account of Austin and Holmes draws from John C.P. Goldberg, *Two Conceptions of Tort Damages: Fair v. Full Compensation*, 55 DePaul L. Rev. 435, 463-65 (2006).

tort is to start with an account of individual rights, derive from that account a set of relational duties the breach of which constitutes private wrongs, then further derive the idea of a private right of action—a power to seek recourse through law that belongs to the right holder whose rights have been violated by the doing of the wrong. In his desire to recast positive law in terms of sovereign commands, Austin inverted this model by starting with the fact of the law's having authorized suits for damages, then reasoning from there to the character of the claims being brought. In his view, it is only because the English sovereign had chosen to enact laws authorizing persons to bring private suits for damages in response to others' conduct that the Blackstonian category of private wrongs—and the relational duties underlying them—had come into existence. Thus, to Austin, tort law was not about judges and juries giving expression to conventional understandings of rights and wrongs, nor about giving legal expression to some sort of pre-legal right to recourse against one's wrongdoers. Rather, it was about the sovereign issuing a special kind of command granting to certain persons a positive-law power to sue under certain conditions, and only thereby creating a set of relational legal duties that actors who might be subject to suit were bound to observe on pain of sanction at the request of their victims.

Austin's top-down, remedy-driven conception of torts went hand in hand with a reconceptualization of the main purpose of tort actions. Although Austin conceded that the immediate purpose of a tort suit was to empower the victim to obtain redress, he also insisted that this fact was not dispositive for the characterization of this body of law. Once we recognize that tort rights of action exist only because of the sovereign's decision to arm people with the power to sue others, we can ask why the sovereign has chosen to arm them. Austin concluded that the provision of tort actions stemmed from the sovereign's interest in deterring immoral conduct. The "paramount" point of a private right of action, he concluded, "like that of a criminal sanction[,] is the prevention of offenses generally."<sup>17</sup>

Starting in the 1870s, Holmes developed and significantly revised Austin's approach. Like Austin, Holmes characterized tort as imposed on citizens by the state (through its judges), rather than built up from a foundation of rights embodied in Anglo-American social norms and practices.<sup>18</sup> Unlike Austin, however, Holmes argued that this regime of private suits had nothing to do with breaches of relational duties owed by one person to others, and indeed nothing at all to do with duties or the ought-ness associated with rules describing acceptable and unacceptable behavior.<sup>19</sup>

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17. See 1 Austin, *supra* note 16, § 722, at 360.

18. See Goldberg & Zipursky, *supra* note 2, at 1752-56 (discussing Holmes's conception of tort duties).

19. See Holmes, *The Common Law*, *supra* note 5, at 144 ("[T]he general purpose of the law of torts is to secure a man indemnity against certain forms of harm to person, reputation,

First, Holmes insisted, the duties in tort law are not, in the end, genuine duties. In this respect, Holmes's thinking about tort law went hand in hand with his thinking about jurisprudence. As Holmes famously argued in *The Path of the Law*, a client who asks his lawyer to inform him of the content of his legal duties is not asking for advice on what he ought to do, if "ought" is used in a moral sense. He is, instead, seeking a reliable prediction about the sort of conduct that will or will not expose him to court-ordered sanction. Because this is what is meant by "legal duty," and because this is what one who is knowledgeable about law would understand assertions about legal duties to mean, legal duties turn out, on inspection, not to be duties after all. Moreover, thought Holmes, the supposed duties of tort law are quite plainly not attached to the sort of "forbidding" that goes along with moral duties. If in recognizing the cause of action for battery, tort law really meant to say that one is duty-bound to refrain from touching others absent permission, then it would have attached a different kind of consequence to such actions, rather than merely requiring the batterer to pay for the privilege of touching.<sup>20</sup>

Second, Holmes argued, even if one insists on speaking euphemistically of the "duties" generated by tort law, those duties are properly described as non-relational rather than relational. These "duties" are created by the state, and owed to the state. The fact that a private citizen would typically end up being a beneficiary of them does not alter the fact that they are imposed and underwritten by courts—state actors.<sup>21</sup> To say that a cause of action for negligence requires the plaintiff to establish that a defendant breached a duty owed to her, or persons such as her, is thus to describe erroneously the form of the rules of tort law. What tort law really says is that a person can avoid risking sanction by acting reasonably, full stop (as opposed to reasonably with respect to one or another class of persons).

Third, Austin, no less than Blackstone, earned Holmes's disdain for relying on the hidebound and moralistic supposition that the law of a modern liberal state would or should give expression, even indirectly, to primitive notions of blaming, retaliating, and punishing.<sup>22</sup> With the arrival of the industrial revolution and modern, secular, atomistic society, tort law was no longer Blackstone's eclectic gallery of private wrongs, but instead a law of accidents. As such, it was decreasingly concerned with the sort of conduct that could plausibly be described as being worthy of state regulation on the ground of being "wrongful." (Hence it was no "accident" that, under the objective standard of reasonableness, moral blameworthiness in a full-blooded sense was not a formal condition of liability for negligence.) Indeed, modern law, Holmes supposed, had so far moved past these concerns that not only tort law, but even criminal law, was coalescing

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or estate, at the hands of his neighbors, not because they are wrong, but because they are harms."); see also *id.* at 149.

20. See Holmes, *Path of the Law*, *supra* note 5, at 462.

21. Goldberg & Zipursky, *supra* note 2, at 1756.

22. Holmes, *The Common Law*, *supra* note 5, at 81-82.



around a liability standard that rendered genuine culpability irrelevant. Liability instead was triggered whenever a person in a position to foresee that his conduct might cause harm to another failed to take steps to guard against that harm.<sup>23</sup> That both criminal and tort law deployed this “objective” standard of reasonableness—one that does not track notions of moral blame<sup>24</sup>—confirmed for Holmes that the state’s reasons for issuing sanctions had nothing to do with the wrongfulness of a citizen’s acts. Instead, the modern, liberal state was using law to draw the boundary between acts one is at liberty to undertake without risk of state-imposed adverse consequences and acts for which one runs that risk.<sup>25</sup> This, in turn, would give people room to act and permit them, with the help of their Holmesian lawyer-predictors, to order their affairs and make rational decisions about how to go about their lives given their preferences.

But if, in Holmes’s view, criminal and tort law were concerned to draw the same liability line, what was the point of the common law’s having kept the two categories distinct? Austin, following Blackstone, had an answer to this question, one that focused on the real party in interest (i.e., a private citizen in a tort suit, as opposed to the public in a criminal prosecution). That option, however, was not available to Holmes, because he rejected the idea that there was a distinction to be drawn between relational and absolute duties, and hence had no reason to locate the unique character of tort law in the fact that it empowered private citizens to sue in their own right, rather than empowering them to sue on behalf of the public or empowering public officials to prosecute.<sup>26</sup> Instead of focusing on the identity of the real party in interest, Holmes looked to the *character and purpose of the state-imposed penalty* that attached to unreasonable conduct in these two classes of legal proceedings. In criminal cases, judges ordered fines and imprisonment out of a concern for “prevention”—albeit prevention of harms, not (as Austin had supposed) prevention of the commission of moral wrongs.<sup>27</sup> By contrast, in tort cases, the government, through its courts, ordered actors who had exceeded the sphere of liberty granted to them by the law *to bear losses* incurred by others as a result of their having taken liberties. In short, what warranted treating tort law as a department in its own right was that it tells citizens when they will have to indemnify others:

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23. *Id.* at 53. Holmes sometimes backed off the strongest versions of this claim. He acknowledged, for example, that tort law sometimes treats the presence or absence of certain subjective mental states such as “malice” as critical to the determination of whether an actor will be sanctioned. See Oliver Wendell Holmes, Jr., *Privilege, Malice, and Intent*, 8 Harv. L. Rev. 1, 2 (1894). Despite relenting on the idea that the entire common law had settled on a single liability standard, Holmes clung to the notion that one could see in tort law a “tendency” toward the realization of a “general theory” of liability for acts that cause harm under circumstances where the risk of harm was or should have been manifest to the actor. Holmes, *Path of the Law*, *supra* note 5, at 471.

24. Holmes, *The Common Law*, *supra* note 5, at 107-09.

25. *Id.* at 79.

26. See Goldberg & Zipursky, *supra* note 2, at 1756.

27. Holmes, *The Common Law*, *supra* note 5, at 46.

"The business of the law of torts is to fix the dividing lines between those cases in which a man is liable for harm which he has done, and those in which he is not."<sup>28</sup> Tort, in this view, is a law of liability rules set up to provide compensation to those who suffer certain undeserved setbacks.<sup>29</sup> This is why Holmes saw the central task for judges faced with tort suits to be clarifying what does or does not count as reasonable conduct in particular contexts. By issuing matter-of-law rulings, judges would eventually supplant the "featureless generality" of the reasonable person standard<sup>30</sup> with a judge-made code of per se rules of reasonable and unreasonable conduct that would give citizens clear notice of when they could expect to be ordered to pay compensation to another person. Citizens could then decide for themselves whether to risk incurring that expense.

### C. Holmes's Legacy in Torts

Holmes's approach to tort law, legal duties, and law provided the launching pad for mainstream modern tort scholarship. To some extent, however, his influence has been masked because later theorists have taken Holmes's work in at least two directions that Holmes himself did not. First, many leading tort scholars have ironically<sup>31</sup> linked Holmes's thinking about jurisprudence and tort law to a progressive political agenda.<sup>32</sup> That is, they saw and have seen in Holmes's duty skepticism a basis for liberating tort law from what they perceived to be its historical commitment to the protection of owners of property and capital over the interests of individual workers and consumers. Tort law, shorn of its moralistic veneer, was revealed to be a regulatory regime that could and should be changed to better track the political commitments of the emerging (later established) welfare state.

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28. *Id.* at 79; see also *id.* at 96, 144.

29. It is possible that, by making tortfeasors indemnify victims, the state would reduce the incidence of tortious conduct. But Holmes did not explain or defend tort law as an incentive scheme of this sort. Rather, he treated it as a system for allocating losses as between an innocent victim and an actor who had taken more than his fair share of liberty (where "fairness" was determined by the standards of conduct set out by judicial decisions in negligence cases).

30. See *id.* at 111.

31. This is ironic because Holmes himself did not link his thoughts on law to progressivism. See Albert W. Alschuler, *Law Without Values: The Life, Work, and Legacy of Justice Holmes 19-30* (2000) (emphasizing "Nietzschean" aspects of Holmes's thought); Grant Gilmore, *The Ages of American law 48-49* (1977) (arguing that the image of Holmes as a progressive, sometimes associated with his *Lochner* dissent, is false).

32. See John C.P. Goldberg, *Misconduct, Misfortune and Just Compensation: Weinstein on Torts*, 97 Colum. L. Rev. 2034, 2045-49 (1997) (discussing how Fleming James adopted and inverted Holmesian tort theory); Goldberg & Zipursky, *supra* note 2, at 1756-66 (describing Prosser's elaboration of Holmes's framework). That later Holmesians were more politically progressive explains why they, and not Holmes, were keen to disparage the older conception of tort as a law of wrongs on political as well as jurisprudential grounds. Specifically, they, unlike Holmes, saw an unholy connection between conceiving of tort law as a law of private wrongs and laissez-faire politics. See, e.g., Goldberg & Zipursky, *supra* note 2, at 1760-61.

Second and relatedly, regardless of their political stripes, Holmesian tort scholars have been more accepting of having judges function as self-conscious, aggressive law reformers.<sup>33</sup> In their view, judges are presumed to have substantial leeway to change the contours of tort liability in light of “policy” considerations.<sup>34</sup> Whereas Holmes saw the primary task for judges to be that of reducing the reasonable person standard to relatively clear liability rules, later Holmesians have described and generally approved of judges using the jurisdictional hooks provided by elusive concepts like “duty” and “proximate cause” to craft liability rules that are most likely to achieve desired results such as deterrence of antisocial conduct or compensation of the injured.<sup>35</sup>

Despite the undeniable importance of these developments, they in no way detract from our basic point, which is that Holmes, by linking a radical jurisprudential argument to a radical reconceptualization of tort law, changed the landscape of tort theory. With some prominent exceptions,

33. On Holmes’s relatively narrow, formalistic conception of the judge’s role, see Thomas C. Grey, *Molecular Motions: The Holmesian Judge in Theory and Practice*, 37 Wm. & Mary L. Rev. 19, 28, 32 (1995).

34. See Goldberg & Zipursky, *supra* note 2, at 1762-66 (describing Prosser’s conception of judicial reasoning about duty questions as policy making). Holmes was not unaware or disapproving of this conception of the judicial role, but he seems to have been of the view—surely common in his time—that judges could not (and perhaps should not) be expected to operate self-consciously as policy makers. See Holmes, *supra* note 23, at 3 (noting that judges invoke policy considerations to limit liability but are reluctant to admit they are doing so). With the subsequent rise of the administrative state and, still later, Warren Court conceptions of public-law adjudication, Holmesian scholars, many of whom were or are more sympathetic to expansive government regulation than was Holmes himself, have tended to cast courts on the model of mini-legislatures or agencies. Of course, they conceded that courts suffer from significant drawbacks as lawmakers. Most obviously, they are not able to engage in *de novo* legislation or formal rulemaking, nor can they act *sua sponte* or purely prospectively. Instead, they are ordinarily limited to ordering a person or entity (or small group) to pay another person or entity (or other persons and entities) in light of past actions. Given these limits on the power delegated to courts, later Holmesians have supposed that the most plausible “regulatory” assignment government can give to courts presiding over tort cases is that of contributing to the deterrence of undesirable (antisocial) conduct and/or to the compensation of persons who have suffered undeserved losses. In this view, courts might be thought of as “ministries for deterrence and compensation,” with tort plaintiffs cast as “bounty hunters” who are authorized to sue by the law in the service of these policy goals. John C.P. Goldberg, *Twentieth-Century Tort Theory*, 91 Geo. L.J. 513, 522-29 (2003) (describing basic tenets of Holmesian compensation-deterrence theory).

35. See Goldberg & Zipursky, *supra* note 2, at 1762-66. Although Holmes was keen to apply cynical acid to the concepts of legal right and legal duty, his cynicism was in retrospect rather selective. (Is this not always the case when cynics are viewed in hindsight?) In particular, he seemed quite prepared to take at face value concepts such as foreseeability, reasonableness, and causation that later Holmesians have sought to deconstruct on terms comparable to his deconstruction of right and duty. For example, no less mainstream a source than the American Law Institute now tells us that foreseeability is a vacuous concept, and therefore cannot (as Holmes himself had supposed) provide a ground for setting a meaningful limit on liability. See Restatement (Third) of Torts: Liability for Physical Harm § 7, reporters’ note to cmt. j, at 110 (Proposed Final Draft No. 1, 2005). Likewise, William Landes and Richard Posner have declared that causation means whatever it needs to mean to render tort law a scheme of efficient deterrence. See William M. Landes & Richard A. Posner, *The Economic Structure of Tort Law* 229-30 (1987).

mainstream tort scholars have been working and arguing with each other in a Holmesian vein, rather than fighting against it, which is to say, first and foremost, that they accept the fundamental tenet that tort law is a law of liability rules rather than a law that imposes duties of conduct.

Holmes's argument for this fundamental tenet is identical to his general jurisprudential argument for the nonexistence of legal duties. This, we believe, is a telling observation. For while Holmesian duty skepticism may be orthodoxy in tort theory, the identical jurisprudential position has long been discredited within analytic jurisprudence. The scholar who is credited with this discrediting is, of course, H.L.A. Hart. Our claim in the next section is that a version of Hart's influential critique of Holmesian jurisprudence is equally applicable at the level of tort theory. Because the Holmesian position holds no more water as a claim about tort law than it does as a jurisprudential claim, we argue that it is time to abandon some of the central features of modern tort theory.

## II. HART'S CRITIQUE, THE INTERNAL POINT OF VIEW, AND DUTY REVISITED

### A. *Hart's Jurisprudential Critique of Holmes on Obligation*

Hart's critique of Holmes in *The Concept of Law* may be divided into two parts, one negative and one constructive. On the negative side, Hart shows that Holmes's predictive theory of law is untenable, and that Holmes's proffered analysis of legal obligations simply fails to capture the phenomena that a jurisprudential theory must capture in order to be adequate. On the constructive side, Hart provides a framework that yields a plausible analysis of the sense in which it is cogent to talk about legal obligations (and legal duties) as a species of obligation comparable to, yet distinct from, moral obligations recognized in everyday life.

#### 1. The Negative Aspect of the Critique

Hart's negative critique of Holmes on duties has several components. We will focus on two: the argument against predictiveness, and the argument from the obliged/obligated distinction.

*The Argument Against Predictiveness.* In an effort to account for the ordinary parlance of duty—what it means for a speaker to assert that she is under an obligation to refrain from doing *X*—Holmes proposed to treat such statements as predictions that liability will follow if she does *X*. Hart's most concise, and in some ways most crushing, response to this view is that people obviously can and often do mean something distinct from predicting the onset of disagreeable consequences when they assert that they (or someone else) are under a legal obligation, because it is not incoherent to assert *both* that someone is subject to an obligation and that she is under no risk of sanction:

If it were true that the statement that a person had an obligation [to someone] meant that *he* was likely to suffer in the event of disobedience, it would be a contradiction to say that he had an obligation, e.g. to report for military service but that, owing to the fact that he had escaped from the jurisdiction, or had successfully bribed the police or the court, there was not the slightest chance of his being caught or made to suffer. In fact, there is no contradiction in saying this, and such statements are often made and understood.<sup>36</sup>

Additionally, Hart pointed out that assertions about obligations clearly can carry some content other than predictive content. Elsewhere, Hart observed that Holmes's "predictive" analysis is particularly unable to account for judicial speech about obligations.<sup>37</sup>

*The Argument from the Obligated/Obligated Distinction.* Perhaps the most memorable negative argument in *The Concept of Law* against the Holmesian conception of obligation is in some ways the most subtle. Holmes believed that having a legal duty (or obligation) to do *X* as a result of a law put forward by the sovereign was roughly analogous to being told by a threatening gunman that one must do *X*. Such a person would be obligated to do *X* on pain of suffering some sanction that the more powerful party is in a position to inflict. In law, the more powerful party is the state.

Hart responded that to adopt such a picture is to lose sight of the distinction between being obliged and being obligated. The addressee, in the above example, might truly describe himself as "obliged to do *X*." But if the threat issued were the only reason provided to him to do *X*, then it would not be correct to describe this as an obligation to do *X*: "There is a difference . . . between the assertion that someone *was obliged* to do something and the assertion that he *had an obligation* to do it."<sup>38</sup> The former is a psychological statement referring to the beliefs and motives with which the action is done. "But the statement that someone *had an obligation* to do something is of a very different type . . ."<sup>39</sup> It connotes that there are or may be mandatory reasons applicable to the person under the obligation in light of which he ought to do *X*. Holmes's account of duties misses this distinction entirely.

## 2. The Constructive Aspect of the Critique

A large subset of laws, on Hart's view, consists of what he calls "primary rules."<sup>40</sup> The force of these primary rules is to enjoin, direct, or demand (generally) conduct of a certain form. "Car lights are to be used after dusk or when it is raining" is a primary rule, directing persons who drive cars to turn on their headlights under certain circumstances. "The fork and knife

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36. Hart, *supra* note 6, at 84.

37. *Id.* at 10-11.

38. *Id.* at 82.

39. *Id.* at 83.

40. *Id.* at 91.

should be put on the plate when one is finished eating" is a primary rule, too—one of etiquette. Some forms of rule—legal and moral, for example—impose obligations, while other forms of rule—rules of etiquette, for example—do not.

Hart contended that three features separate those domains of life in which socially recognized rules are conceived of as imposing obligations and those in which they are not. First, "[r]ules are conceived and spoken of as imposing obligations when the general demand for conformity is insistent and the social pressure brought to bear upon those who deviate or threaten to deviate is great."<sup>41</sup> Second, and in part explaining why there is social pressure, in the domain where obligations are imposed by rules, the rules "are believed to be necessary to the maintenance of social life or some highly prized feature of it."<sup>42</sup> In the third place,

it is generally recognized that the conduct required by these rules may, while benefiting others, conflict with what the person who owes the duty may wish to do. Hence obligations and duties are thought of as characteristically involving sacrifice or renunciation, and the standing possibility of conflict between obligation or duty and interest is, in all societies, among the truisms of both the lawyer and the moralist.<sup>43</sup>

Hart, of course, believed that legal systems are among those whose primary rules do impose obligations and duties. His recognition that the primary rules of law enjoyed these three features, is coupled with his analysis of obligations as particular to rules enjoying these features. The result is that Hart is able to offer an interesting explanation of what it means to say that the law imposes obligations, beyond saying that it has rules that enjoin conduct.

So a person has a legal duty to do *X*, according to Hart, so long as there exists a valid legal rule applicable to him that enjoins him to do *X*. To assert that a person has a legal duty to do *X* is not to predict that he will be sanctioned if he does not do *X*. It is to assert that there exists a valid legal rule applicable to him that says, in effect, "Do *X*." It is normally a consequence of such a rule existing that the legal system will also empower someone to impose a sanction or liability for the failure to live up to its primary rules, but asserting that there is a primary rule "Do *X*" applicable to the actor is not simply predicting what will or might happen if the actor does not do *X*.

A citizen's capacity to recognize legal obligations is, in part, a capacity to recognize legal norms as enjoining conduct—to grasp that some valid part of the legal system is, in effect, speaking to a kind of situation and directing that she act (or not act) a certain way in that situation. In *The Path of the Law*, Holmes famously advised graduating law students that the good lawyer develops expertise in gleaning information from the legal

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41. *Id.* at 86.

42. *Id.* at 87.

43. *Id.*

system applicable to his clients—information about what possible sanctions lie ahead for certain courses of conduct. Hart, by contrast, emphasizes a lawyer's or layperson's capacity to glean information about what the legal system is saying one is permitted or not permitted to do. Hart famously distinguishes his legal actor's perspective from the one described by Holmes: The Hartian actor occupies the "internal point of view," whereas the Holmesian occupies the "external point of view."<sup>44</sup>

## B. *Applying Hart's Jurisprudential Critique to Tort Theory*

### 1. The Presumptively Hartian Nature of Tort Law

Hart's jurisprudential argument bears on modern tort theory in two ways. First, it creates philosophical space for a non-Holmesian, duty-accepting account of tort law. After Hart, there are no grounds for supposing that Holmesian reductionism about duties is the only analytically respectable or hard-headed position to take on the issue of how to understand law generally and tort law in particular.

Second, and more affirmatively, Hart's approach points toward the sort of evidence to which one might appeal, in the first instance, to support the claim that, in fact, a given body of law is a body of genuine duties, not liability rules. The phenomena one would want to observe, he demonstrated, concern how ordinary citizens, lawyers, and officials talk and act in certain spheres—in particular, what they say, and what they mean when they say, that one is under some sort of duty not to injure another. In other words, once one concedes, as we believe one must concede, that Hart's picture of legal duties as genuine duties is no less available than Holmes's picture of legal duties as liability rules, the question of how to make sense of tort law ceases to be theoretical or philosophical (as Holmes's analysis seems to suppose), and instead becomes interpretive—how best to characterize tort law as it is actually practiced and understood by participants and observers.

With this question in mind, we think there is an overwhelming *prima facie* case in favor of a duty-accepting conception of tort. Simply put, the practice of tort law has long been built, and remains built, around concepts that point toward a law of genuine duties rather than pseudo-duties. Admittedly, Holmesian tort scholars have marshaled arguments suggesting that tort law is something quite different than it appears to be. We will discuss and rebut several such arguments in Part III. For now, however, we will merely note some of the features that seem rather evidently to favor a Hartian understanding of tort law as a law of duties.

For centuries, lawyers have talked about the law of trespass, the law of private wrongs, and the law of tort. In doing so, they have conceived of each in terms of obligations, wrongs, and redress, not agencies, fees, and

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44. *Id.* at 89-91.

risks of sanction. In particular, as we noted above, at least by the mid-1700s, the various actions cognizable under the writs of trespass and case came to be understood as a gallery of wrongs—a catalogue of the ways in which one person could act wrongfully toward another, such that the other would be entitled to demand redress at law from the other.<sup>45</sup> If tort law were really, as Holmesians suppose, a regulatory scheme for deterring and compensating, the traditional vocabulary and syntax of tort ought to have developed quite differently than it did. And, of course, it is hardly the case that judges and lawyers in modern times have simply abandoned these ways of thinking and talking about torts.<sup>46</sup>

Likewise, it tells us something that, in ordinary conversation, we have no trouble invoking the idea of a legal duty independently of the idea of moral duty and the idea of risk of sanction. Thus, if asked, most of us would acknowledge that we act under a legal duty to refrain from driving while intoxicated. And we would mean by that that the law actually obligates us to refrain from driving when we are in that condition. We would *not* mean only that one can reliably predict facing a fine or jail time for such behavior. (This, even though most would cite the risk of a fine or imprisonment as one of several reasons, perhaps even the main reason, for heeding the duty.) When confronted with an instance of a conviction for

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45. See *supra* text accompanying notes 9-12.

46. A standard appellate opinion affirming a judgment for the plaintiff in a negligence case might read (in artificially condensed form) as follows:

The defendant owed the plaintiff a duty to take reasonable care against causing her physical harm. The jury found, and was entitled to find, that the defendant breached that duty, and that the breach caused harm to the plaintiff of the sort that the defendant was duty-bound to take care against causing. Therefore, the plaintiff was entitled to compensation from the defendant for the injury done to her.

Now imagine the same opinion written in the language of modern Holmesian tort theory:

We, the members of the ministry of deterrence and compensation (MDC), must consider whether to assess the undesired conduct fee (UCF) on subject (S), who has been brought to our attention by notifying citizen (N). We determine that S's conduct is the sort to which the fee attaches. Because the government desires to induce citizens to notify the MDC of undesired conduct so that such conduct might be deterred, and because the government wishes to provide monetary assistance to those who have experienced certain misfortunes, the UCF is payable only if, as is the case here, the notifying person establishes a nontrivial possibility of some connection between the undesired conduct and a setback experienced by the notifying person. Having established this possibility, N is entitled to recoup the UCF, owed in the first instance to the MDC, which is set at an amount equal to the value of the setback suffered by N. The MDC will grant ad hoc exemptions from the UCF to advance other worthy policy goals or to prevent the fee system from working an injustice. However, it finds no basis for granting an exemption here.

The point of this obviously stylized contrast is to suggest, as have others, that, while the vocabulary of tort law is not God-given or sacrosanct, neither is it a collection of empty labels waiting to be filled with whatever content commentators wish to pour into it. See, e.g., Jules L. Coleman, *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory* 13-24 (2001) (arguing that certain versions of economic analysis of tort law are interpretively impoverished for not being able to make sense of the language of the practice of tort law); Benjamin C. Zipursky, *Pragmatic Conceptualism*, 6 *Legal Theory* 457, 457-66, 470-80, 483-85 (2000) (arguing the same).



driving under the influence, we generally do not think it correct to say, "Oh, there's a guy who got hit with the drunk-driving tax"—that is, unless the speaker is playing off of conventional meanings. We would also be able to distinguish this legal duty from the independent question of whether there is a moral duty to refrain from driving while intoxicated. (This, even though the likelihood that there is such a moral duty informs lawyers' and judges' judgments as to whether there ought to be a parallel legal duty.) That we can in our everyday language and everyday experience talk about legal duties as a distinctive phenomenon was to Hart, and is to us, an important clue as to how we should analyze the concept of law and the concept of a legal duty.

The suggestion of this section is modest. We do not purport to have resolved fundamental debates over the nature and character of tort law. Rather, we aim to have shed some light on how best to approach them. Hart's antireductionist approach to jurisprudence proceeds on the idea that language and practices ought to be taken seriously. This is not to say that existing ways of doing and talking are always coherent, much less that they are always appealing or defensible. It is to say instead that the appropriate first move in an effort to theorize a subject is to work with, rather than dismiss as empty, the ways in which those acting within a practice make sense of it. If one takes this approach to understanding tort law, we suggest, one has to concede that, in the first instance, it presents itself and hangs together as a law of rights, duties, and wrongs. Of course it still may be the case that appearances are misleading, or that this way of thinking about the law is unsatisfactory. But there is no philosophical reason to adopt this supposition from the start. Quite the opposite, it is entirely possible for tort law to be what it appears to be. The proof of the skeptical thesis will have to be in the pudding, and the skeptics bear the burden of making that showing. As we have argued elsewhere, and will argue below, the skeptics have not met their burden. Tort law is better understood and explained as a law of guidance rules than a scheme of liability rules. However, before turning in Part III to consider the merits of some prominent claims made on behalf of duty-skeptical accounts of tort law, we first will pause to observe some reasons why many duty-skeptics should not be threatened by, and indeed ought to be receptive to, duty-accepting theories of tort law.

## 2. Why Holmesian Tort Theorists Ought to Be Receptive to a Hartian Conception of Duty

Holmesian duty-skepticism arises in part out of some legitimate concerns about potential drawbacks associated with duty-accepting theories of tort law. Some of these are equivalent to the concerns that Holmes himself harbored about thinking of law in terms of real duties, including the concern that doing so generates a conception of law that is soft-minded or too moralistic. Other concerns—particularly the worry that duty-accepting theories inevitably link tort to regressive political values—are not ones that

Holmes shared. The point is that Holmes was, and Holmesians often are, attracted to the radical jurisprudential position of duty skepticism out of a belief that the adoption of such a position is necessary to ward off thinking about tort that is too squishy, too priggish, and/or too politically conservative. One of Hart's great achievements was to demonstrate that these associations are false. A jurisprudence that treats duties as genuine obligations need not entail any of these "sins," and thus duty skepticism cannot be defended, and should not be embraced, as somehow necessary to avoid them.

Here, one must recall that Hart took himself to be a positivist working within the tradition developed by Bentham, Austin, and Holmes. Thus, Hart claimed to share some of their core aspirations, including the aspiration to separate law from morality. Unlike his predecessors, however, Hart believed that this separation was not to be achieved by defining legal duties by reference to underlying sovereign commands, but in appreciating that legal duties derive from legal rules. That legal duties are distinctive in this way, Hart argued, explains why their content does not simply track or collapse into moral duties.

Hart likewise linked his anti-skeptical approach to the progressive aspirations of positivism found, most obviously, in the work of Bentham. That is, Hart perceived an intimate connection between being faithful to, and clear on, the meaning of concepts and the cause of law reform. In this respect, Hart was an anti-antiformalist. One of the core claims of the antiformalists of the early and middle decades of the twentieth century was that "formalism" is nothing but a bar to progressive law reform, and hence that "realism" about law—i.e., anti-conceptualism—was needed to achieve reform.<sup>47</sup> Hart's sense, by contrast, was that careful attention to the meaning and implications of the words that we use and the practices in which discourse takes place can provide a platform from which to locate and launch sensible reforms. With respect to this aspiration, Hart's and Holmes's thinking again shared a trait, yet also fundamentally differed. Holmes, like Hart, explicitly defended his effort to redefine law and legal duty as necessary to "get the dragon out of his cave" so that an intelligent decision could be made as to whether to tame or kill it.<sup>48</sup> But Holmes's very un-Hartian instinct was to achieve this goal by stripping away from legal concepts any moral tincture, including any attribution to them of normativity or ought-ness. Hart likewise sought to demystify law in large part to counteract what he took to be a tendency among officials and

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47. See Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 Colum. L. Rev. 809 (1935) (arguing that the deconstruction of legal concepts is the necessary first step toward an enlightened and scientific approach to the law). We do not mean to take a position on whether a reductionist approach to legal concepts is a hallmark of Legal Realism in all its many variants. It is clearly a prominent feature in the work of some Realists, including Cohen.

48. Holmes, *Path of the Law*, *supra* note 5, at 469.

ordinary citizens to treat it with excessive reverence.<sup>49</sup> It is just the law, he wanted people to see, not God's word, so if we want to reform it we can and should. Yet Hart's method for achieving this end was not to remove the ought-ness from law but to capture what is distinctive about legal ought-ness as opposed to moral ought-ness.

For these reasons, Hart's work offers some cogent and practical guidance on how to think about tort law in a non-Holmesian vein. It encourages us to take the language of tort law at face value—to resist the common impulse among law professors to say, “When a judicial opinion uses the legal term *X* (duty, foreseeability, cause, etc.), it is *really just* saying that, for reasons of policy or principle, liability ought or ought not to attach in this case.” Specifically, on the issue of duty in negligence law, Hart likewise offered a compelling riposte to the now-familiar Prosserian mantra that a duty of care exists when a court says it exists.<sup>50</sup> A statement to this effect, Hart pointed out, does not mean that negligence law is a practice in which the decision maker's completely discretionary decision determines the outcome.<sup>51</sup> Rather, it is a hyperbolic way of emphasizing that, in hard cases for which there is more than one reasonable resolution, the resolution reached by the highest court in the relevant jurisdiction will be dispositive simply because of the jurisdictional rule specifying that that court is the final arbiter of such questions.

And, again, Hart's conceptualism is not meant as hairsplitting for its own sake. Instead, it encourages us to resist the reductionist's “*X* is just a way of saying *Y*” mantra to lay the groundwork for sensible law reform. How so? As we have argued extensively elsewhere, if one actually approaches tort law from the inside, making sense of its core concepts and how they hang together, then one is left not (merely) with a pretty picture, but a schematic that permits one to ask more sensible questions about how tort law should be shaped going forward.<sup>52</sup> For example, as we have discussed above, Holmesian scholars are all too prone to say (wrongly) that tort law is a system for deterring antisocial conduct and compensating victims for costs related to injuries. As a result, when studies emerge suggesting that only one out of ten patients with viable medical malpractice claims sue their doctors, they are taken to demonstrate that tort law is disastrously dysfunctional.<sup>53</sup> While the latter conclusion may in the end be true, this particular argument is fatally flawed because of its false premise. Tort law,

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49. See H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 Harv. L. Rev. 593, 596-97 (1958).

50. William L. Prosser, *Palsgraf Revisited*, 52 Mich. L. Rev. 1, 15 (1953) (“There is a duty if the court says there is a duty; the law [of negligence], like the Constitution, is what we make it.”).

51. Hart, *supra* note 6, at 141-47.

52. See, e.g., John C.P. Goldberg & Benjamin C. Zipursky, *Unrealized Torts*, 88 Va. L. Rev. 1625 (2002) (using pragmatic and conceptualistic tort theory to clarify doctrine regarding liability for exposure-only victim cases).

53. John C.P. Goldberg, *What Are We Reforming?: Tort Theory's Place in Debates over Malpractice Reform*, 59 Vand. L. Rev. 1075 (2006).

if its concepts are taken seriously, is not a social or regulatory program that aims to maximize compensation and/or deterrence. As we have argued elsewhere, it is in fact much closer to being the system that Locke and Blackstone described, i.e., a law of private wrongs.<sup>54</sup> That is, it is a branch of law that arms victims with a particular power—the power to sue others who have wronged them for redress, if they choose to do so. It follows that, if they do not choose to sue, and if that choice is informed and voluntary in the appropriate sense (which is partly an empirical question, of course), then the theorist has lost the principal basis for thinking the system is broken. It is working exactly as it should. The idea of a private wrong is the idea of a wrong as between injurer and victim: a breach of a duty owed by the tortfeasor to the victim that gives rise to a right in the victim to respond to the wrongdoer. The victim's power to sue is thus not correctly captured by the idea of the "private attorney general"—the ordinary Joe or Jane who, bearing a tin star, does the public's bidding with complaint and discovery requests. A tort action is a right of the victim. Hence, it is one that he or she can forbear from asserting even if doing so will undermine the cause of deterrence or compensation.<sup>55</sup>

More broadly, a Hartian appreciation of tort law's core concepts, even though it asks us to take the internal structure and logic of tort law more seriously than does Holmesian tort scholarship, can help ward off an unduly reverential disposition toward tort law, just as Hart hoped that his work would ward off such an attitude toward law generally. Consider, in this regard, corrective justice theory. Corrective justice theory has many virtues, including the virtue of being anti-Holmesian in some respects. In particular, as demonstrated perhaps most clearly in Ernest Weinrib's work, it can take seriously the idea of tort law as a law of wrongs.<sup>56</sup> Yet there is a way in which it glosses over aspects of tort law that, when confronted on their own terms, seems to divorce tort law from justice (at least on a certain understanding), and may even make it somewhat less appealing from a normative perspective. In particular, the core corrective justice notions of erasure, annulment, restoration, and repair arguably present tort law in a light that is at times too generous. Tort law is not a matter of the state ordering a tortfeasor to make good on a moral debt (or moral duty of repair) owed to the victim, even though most tort plaintiffs are, of course, given damages meant to compensate them for their losses. Instead, it is about arming victims with a legal power to pursue those who have wronged them. Tort, in other words, enables victims to exact redress from those who have

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54. See Goldberg, *supra* note 10; Benjamin C. Zipursky, *The Philosophy of Private Law*, in *The Oxford Handbook of Jurisprudence & Philosophy of Law* 623 (Jules Coleman & Scott J. Shapiro eds., 2002).

55. Although Hart was not a tort theorist, he once sketched a picture of tort law that is quite compatible with the foregoing, perhaps adding some credence to our claiming of his mantle in this area. See H.L.A. Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory* 183-85 (1982).

56. See generally Ernest J. Weinrib, *The Idea of Private Law* (1994).

mistreated them in certain ways.<sup>57</sup> Contra Holmes, to embrace this conception of tort is not to equate it with talionic vengeance. Instead, it is to appreciate that tort is a civilized alternative to vengeance—civil recourse for the plaintiff, which is appropriately channeled through and cabined by law. But it is also to appreciate and accept that successful tort plaintiffs will sometimes be entitled to something more than “justice” demands or even permits, at least if justice is understood as the achievement of a just distribution of gains and losses as between tortfeasor and victim. Here, the most obvious example is the eggshell plaintiff, who may stand to recover a huge amount of compensation from a minimally culpable defendant. It is questionable whether justice is being done in such cases, but our tort system authorizes this sort of outcome because tort law is not a scheme for restoring a normative equilibrium as between doer and sufferer. It is, for better and worse, a law for the redress of private wrongs.

### III. GOING FORWARD FROM HART’S CRITIQUE OF HOLMES

We have argued that Hart’s jurisprudential work helps to establish that there is a place for a meaningful notion of duty qua obligation in the law of torts. This is because Hart helps us to see that there is no reason to equate being careful, hard-headed, or realistic about tort law with an effort to denude it of morally tinged, yet ultimately distinctively legal, concepts such as duty. In tort, duties are no more or less “real” than acts of carelessness or damages. Yet they are genuinely legal duties—duties by virtue of their being part of the law. With this insight, certain mainstays of Holmesian thought melt away. For example, the idea that the objectivity of the reasonable person standard entails that tort law cannot be about genuine duties reveals itself as a non sequitur. Possibly, the argument would carry weight if we were discussing moral duties.<sup>58</sup> But tort duties are legal duties, and legal duties obligate for different reasons, and under different circumstances, than moral duties.<sup>59</sup>

As we observed above, the ability of Hart’s work to create a space for a notion of legal duty does not of itself suffice to salvage duty in tort law. Rather, it places on duty-skeptical tort theorists the onus of explaining away

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57. For a rich mediation on the interrelated ideas of settling accounts, getting even, and doing justice, see William Ian Miller, *Eye for an Eye* 1-30 (2006). As Miller points out, there is a natural linkage between the notion of enabling a victim to get even with a wrongdoer and the notion of restoring harmony, peace, or balance. *Id.* at 15-16. Still, there is no particular reason to equate the restoration of civil order with the restoration of the status quo ante—victims’ legitimate demands for satisfaction or vindication may require (or at least permit) the law to offer them something more (or different) than a return to the pre-tort state of affairs.

58. *But see* John Gardner, *Wrongs and Faults*, 59 *Rev. of Metaphysics* 95 (2005) (arguing powerfully that it is cogent to identify moral wrongs that are wrong simply by virtue of being breaches of duties, not because they involve wrongful conduct).

59. *See* John C.P. Goldberg & Benjamin C. Zipursky, *Tort Law and Moral Luck*, 92 *Cornell L. Rev.* (forthcoming 2007) (defending the objectivity of the legal standard for fault within a wrongs-based conception of tort).

the seemingly obvious linkage of tort to notions of duty, wrongs, and redress. In fact, Holmes and Holmesian tort theorists have attempted to meet this burden with various arguments. Among the more prominent are the following:

- (1) Within the part of tort law that overtly avails itself of the notion of duty—negligence law—the concept of duty does no real work because it is redundant with the breach element of the *prima facie* case.
- (2) The divergence between conduct for which tort law assigns liability and conduct that society deems morally wrongful is too great to render plausible a genuinely duty-based conception of tort law.
- (3) The notion of a duty of conduct rooted in a positive legal directive makes no sense in tort law, which is not based upon legislative rules about conduct, but in common law decisions about liability.

In prior work, both jointly and severally, we have explained why we believe each of these objections to be unsound.<sup>60</sup> In what follows, we briefly review those arguments and reconsider each with Hart in mind.

#### A. *Duty in Negligence Law*

The argument that duty in negligence law is redundant traces back at least to the British scholars Percy Winfield and W.W. Buckland,<sup>61</sup> and runs roughly as follows. The cause of action for negligence is defined in terms of four elements: (1) duty of reasonable care; (2) unreasonable conduct in breach of that duty; (3) injury to the plaintiff; and (4) a causal connection (including proximate cause) between the breach of duty and the plaintiff's injury. But the duty-of-care element is redundant because if there has been unreasonable conduct, then there has by definition been a breach of a duty to take reasonable care. *A fortiori*, there must have been a duty of reasonable care. Any statement from a court indicating that there is evidence of a breach presupposes the existence of the duty, for the duty is simply the duty to refrain from acting unreasonably. Any statement from a court indicating that the duty element is not satisfied is a confused way of saying that the court does not wish the cause of action to proceed for some reason other than the absence of an obligation of care.

Insofar as this is meant to be a conceptual argument about the inherent redundancy of duty with breach, it is quite obviously fallacious, for there is a way of looking at negligence law—indeed, a standard way of looking at negligence law—that renders the duty element independent of the other elements, including the breach element. In this view, it is entirely cogent to assert that a plaintiff has a cause of action in negligence only if the

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60. See generally Goldberg & Zipursky, *supra* note 2; John C.P. Goldberg & Benjamin C. Zipursky, *The Restatement (Third) and the Place of Duty in Negligence Law*, 54 Vand. L. Rev. 657 (2001).

61. See W.W. Buckland, *The Duty to Take Care*, 51 Law Q. Rev. 637, 639 (1935); Percy H. Winfield, *Duty in Tortious Negligence*, 34 Colum. L. Rev. 41, 43 (1934).

defendant breached a duty of reasonable care owed to her and, in doing so, caused her injury. Of course, in situations in which a tort duty of care is owed, it will usually not be owed only to one person, but instead to a class of persons. But to note this is hardly to abandon the view that negligence law is about relational duties of reasonable care, such that only some persons can claim to be beneficiaries of the duty who are able to point to the unreasonable conduct in question and say of it: "That conduct was unreasonable as to me." For all instances in which a claim is made by a victim who falls outside the class of duty beneficiaries, courts can quite sensibly reason, and do reason, that the victim's claim fails for lack of duty: this even if the defendant "breached" in the sense of acting carelessly toward persons who, unlike the victim, are members of the relevant class. True, one of the hallmarks of modern negligence law is that it identifies duties of reasonable care that are owed to members of very broad classes, such as the class of persons who might foreseeably suffer physical harm were one to fail to act carefully with respect to the risk of such harm. But this fact does not somehow defeat the idea that one can sometimes act carelessly toward members of one class of persons without failing to take care with respect to another class of persons to which the plaintiff belonged. To take a familiar example, accountant *A*'s carelessly performed audit of the books of company *C* might well be a breach of a duty of care owed to identifiable persons or entities who *A* knew would be making a decision to invest in *C* on the basis of its audit. It hardly follows that *A* owed it to everyone in the world to conduct a careful audit, such that anyone who loses money by investing in *C* in reliance on the carelessly performed audit can point to it as a breach of a duty owed to her. There is simply nothing structurally or logically ill-formed about this way of looking at negligence law. Indeed, it is fairly clear that most courts understand negligence law in this way.<sup>62</sup>

But perhaps instead of pressing a conceptual argument, it may be that Buckland, Winfield, and others who have followed in their footsteps—including Prosser, Judge William Andrews in his famous dissent in *Palsgraf v. Long Island Railroad Co.*,<sup>63</sup> and the current drafters of the Third Torts Restatement<sup>64</sup>—are really arguing that negligence law *can be, but should not be*, conceived in terms of relational duties. On this version of the claim, it stands for the idea that we will do better in some relevant sense(s) to think about the duty of reasonable care as a non-relational duty, i.e., duty owed to all the world.

To this rendition of the argument we have several responses. First, and most obviously, if this is really the argument, it needs to be stated and defended as such. To run together an argument that a relational conception

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62. Goldberg & Zipursky, *supra* note 61, at 658-74.

63. *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 103 (N.Y. 1928) (Andrews, J., dissenting).

64. See generally Goldberg & Zipursky, *supra* note 60, at 692-736 (discussing and criticizing the Restatement's embrace of duty skepticism).

of duty is incoherent or confused with an argument that it is available but less desirable than an alternative view is to misrepresent the available options in a serious way and to avoid an argument on the merits. Second, we continue to believe that the historical and doctrinal evidence points strongly in favor of deeming the non-redundant, relational view as the view that has in fact been adopted by most courts, notwithstanding a relentless academic campaign to change the practice.<sup>65</sup>

Third, the supposedly powerful moral argument against the relational view is, in fact, fallacious, and it continues to be the case that our unmasking of that fallacy has been ignored. The fallacy is to suppose that once one concedes that some duties of reasonable care are *in some sense* universal—owed to everyone, or to a very broad class of persons—one must abandon the relational model of duty for a non-relational model. As we have demonstrated elsewhere, the fallacy resides in an equivocation over what is meant by the idea of duty being general or “universal.”<sup>66</sup> As Judge Brett famously pointed out more than a century ago in *Heaven v. Pender*,<sup>67</sup> the duty of reasonable care can sometimes be owed to anyone foreseeably placed at risk of harm by one’s actions, were they to be careless. Likewise, as we have demonstrated (without any response or rebuttal from anti-relationalists), Cardozo’s opinion in *MacPherson*, long taken to be a watershed instance of a court adopting a non-relational conception of duty, in fact adopted the same sort of relational-yet-general notion of duty expressed by Brett.<sup>68</sup>

Fourth, we have offered a series of normative and functional arguments that favor retention of a relational conception of duty within negligence law. We will rehearse those very briefly toward the end of this essay. Fifth, even if one takes the non-relational view of duty, it does not actually entail the adoption of the sort of fully Holmesian view that there is no room for a genuine notion of obligation within torts such as negligence. This is because the idea of a duty owed to the world can in fact refer to a genuine

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65. See generally Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 Vand. L. Rev. 1 (1998) (identifying various aspects of tort doctrine that are difficult to explain absent a relational conception of duty).

66. Goldberg & Zipursky, *supra* note 60, at 705-09. It may be true, as Jane Stapleton points out in her Symposium paper, that some courts will be less likely to recognize appropriately broad orbits of duty if they are invited to take a relational view. See Jane Stapleton, *Evaluating Goldberg and Zipursky’s Civil Recourse Theory*, 75 Fordham L. Rev. 1529 (2006). This does not strike us as a powerful objection to the views we have articulated. The central point of our first coauthored article is that it is simply a fallacy to link the idea of relational duty with narrow or regressive duty doctrines. See Goldberg & Zipursky, *supra* note 2, at 1799-1811 (arguing that modern duty skepticism in tort law is born of a false conceptual linkage of duty acceptance to *laissez-faire*). More generally, we have taken pains in our work to explain just what is or is not entailed by the adoption of a relational conception of duty—including how a relational conception can and has actually incorporated a certain conception of a general or universal duty, and how a well-drafted Restatement could help judges avoid misapplying duty doctrine. See Goldberg & Zipursky, *supra* note 60, at 698-720, 737-50.

67. (1883) 11 Q.B.D. 503 (A.C.) (appeal taken from Eng.) (U.K.).

68. See Goldberg & Zipursky, *supra* note 2, at 1812-25.



duty of conduct, as opposed to a liability rule, even though, given the expansiveness of the duty, it leaves courts no room to reason about duty in resolving negligence cases. (Understood in this way, the analytically simple duty of reasonable care would amount to a directive from courts to individuals enjoining them to act reasonably, period.) Thus, the redundancy argument is unsound, and, in any case, presents no conceptual or moral obstacle to taking duty seriously in negligence law.

*B. The Schism Between Moral Duties and Duties in Tort Law*

A more serious objection against conceptualizing tort law in terms of genuine duties is that there is such a substantial divergence between the terms on which tort law is prepared to impose liability and the terms on which one can fairly be described as having failed to observe a moral duty that it is simply implausible to think of tort duties as genuine “oughts.” In other words, the legal “duties” that provide the basis for liability in tort seem to be both seriously under-inclusive and seriously over-inclusive relative to standard notions of morality and moral duties. For example, liability can attach to blasting activity even if the blasting is done with great care. In such a case, there may be legal responsibility even though there is no breach of a standard of right conduct specifiable independently of the injury having actually occurred. By the same token, there are instances of conduct, such as the failure to undertake even risk-free, easy rescues, that are widely taken to be violative of moral duties, but that do not generate liability in tort because there is said to be “no duty.” As indicated above, the risk that lawyers would be misled by conflating the demands of moral duties and the scope of legal liability was a central force motivating Holmes’s argument that the concept of legal duty must be divorced from a notion of genuine obligation.

On this issue, Hart’s version of positivism provides a helpful response to Holmes’s concerns. Hart analyzed obligations as a genus of social and normative forms (for lack of a better term), and he took moral obligations and legal obligations each to be different species of that genus. To some extent, Hart was following Austin, whose positivism relied heavily on a taxonomy of different categories of “law,” and treated social mores and customary norms as a form of law distinct from positive law.<sup>69</sup> Thomas Aquinas, too, had distinguished natural law from positive law in a manner that took note of parallels in their forms while distinguishing them in terms of both their content and the institutions in and through which they operated.<sup>70</sup> In contrast to Austin, Hart aimed to redescribe the content and nature of the normativity as such in terms of rules rather than commands, while still following Austin’s view that law enjoys an independent

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69. Austin, *supra* note 16.

70. See St. Thomas Aquinas, *Summa Theologiae* (Fathers of the English Dominican Province, trans., Christian Classics Press 1981) (n.d.).

existence and, relatedly, a distinct content from morality.<sup>71</sup> Conversely, Hart aimed to retain Aquinas's emphasis on the normativity of law while, of course, rejecting both natural law metaphysics and the idea that the content of positive law is to be identified, in part, by understanding the natural law.

As indicated earlier, our own aim, within tort, has been to avail ourselves of a roughly Hartian framework for thinking about the nature of duties in tort law. Duty in tort law is about legal obligation, and legal obligations are, in many respects, the same sort of creature as moral obligations. Both involve the setting of standards of obligatory conduct; both involve an injunction concerning how to act (particularly with regard to others); both involve social pressure and expectations of a certain kind; both are aimed to preserve important human goods. And while it is not accidental that the two overlap to a considerable extent, it is also not the case that law necessarily derives from or tracks morality. Rather, it is because legal systems and legal obligations are developed with an eye to achieving and safeguarding many of the goods that are also achieved and safeguarded by moral obligations. Nevertheless, because law comes with consequences that morality does not (most obviously state-enforced sanctions), and because there are, at times, demands on law that it take a certain form that renders it efficacious, capable of being internalized, and amenable to application by judges, there will be times at which it is appropriate for legislatures and judges and jurors to decline to elevate certain moral norms to legal norms. Similarly, there are sometimes reasons that favor recognition of legal norms that do not have counterparts in morality.<sup>72</sup>

Holmes, of course, was deeply concerned about slippage between moral and legal duty. This suspicion is a profoundly important aspect of the positivism that begins with Bentham's assaults on Blackstone and travels through Austin to Holmes. A key question is where Hart stood on this issue. Our own view—probably not too controversial, but perhaps not trivial to defend—is that Hart here stood firmly with Bentham, Austin, and Holmes against Blackstone. In particular, Hart shared their worry that the common law tradition invites lawyers to blur moral and legal obligation. Likewise, Hart self-identified as a positivist because he took it to be a

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71. Hart, *supra* note 6, at 155-57.

72. In other writings, we have offered explanations as to why tort law sets fairly tight limitations on liability for nonfeasance and emotional harm—the under-inclusive side of tort obligations relative to moral obligations. See, e.g., Goldberg & Zipursky, *supra* note 2, at 1799-1811; Goldberg & Zipursky, *supra* note 52, at 1672-94. We have also offered explanations for the objectivity of breach and the significance of rights-based forms of strict liability such as those found in trespass law—the over-inclusive side of tort obligations relative to moral obligations. See Goldberg & Zipursky, *supra* note 60. It may be that a small subsection of the domain of cases commonly treated as strict liability cases—namely those involving abnormally dangerous activities and wild animals—are instances in which tort law functions as a scheme of liability rules (or as Keeton-esque “conditional duties”). The same is not true for other areas of tort law that are sometimes deemed to be areas of strict liability such as trespass, conversion, and nuisance.

central feature of that school of thought that it deemed such blurrings as confusions and perils to be avoided. Of course Hart had no truck with the idea that moral considerations provide reasons for the recognition or extension of legal obligations. Rather, he seemed concerned over a perceived tendency for judges to reason without reflection or hesitation from moral to legal duty. Although Hart's positivist sensibilities lend no support to an argument against the very idea of legal obligations or legal obligations in tort law, they arguably prompt concern over an approach to legal analysis by which the analyst invokes moral concepts to reach conclusions about the existence and scope of legal duties. Insofar as tort law is thought to invite judges to undertake exactly this sort of analysis, one might conclude that Hart's rescue of the concept of duty qua obligation ultimately cannot be harnessed to support an account of tort law built around such duties precisely because of his concerns over leakage between law and morality.

Our response to this envisioned objection is to concede that the principles, rules, and standards that comprise tort law contain a variety of moral concepts within them, and that these concepts figure within tort law in a manner that calls upon judges and lawyers to apply them in order to ascertain what the law entails for the resolution of particular disputes. Within constitutional law and law that constitute rules of recognition, this sort of view has been labeled "incorporationism" or "inclusive positivism."<sup>73</sup> However, the application of this now-familiar insight to the law of tort requires no such grand move or label. All that we are saying is that certain moral concepts are incorporated into substantive legal rules, including the rules of tort law, which means that judges will have to interpret and apply them in the context of deciding certain tort cases. It is an interesting and important analytical question whether one should conceive of judicial applications of these concepts as an exercise of delegated power to "make" law (with Joseph Raz) or if one should say (with Ronald Dworkin) that these are genuine instances of law application.<sup>74</sup> We are inclined to take the latter route, for reasons that we have elaborated elsewhere.<sup>75</sup> But whichever route one takes, it is critical that the judge accurately identify and apply the *legal* norms that she is interpreting and that she not simply assume that she has been delegated the all-things-considered moral question of how to resolve the dispute or class of disputes before her.

There are a variety of jurisprudential reasons for analyzing legal duties as analogous to moral duties, without seeing legal duties as simply a set of applied moral duties. And there are a variety of reasons, institutional and

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73. See generally Coleman, *supra* note 46 (explaining incorporationism and inclusive positivism).

74. See Ronald Dworkin, *Taking Rights Seriously* (2d ed. 1977); Joseph Raz, *Legal Principles and the Limits of Law*, 81 Yale L.J. 823 (1972).

75. See, e.g., Goldberg & Zipursky, *supra* note 2; Goldberg & Zipursky, *supra* note 52; Zipursky, *supra* note 46.

otherwise, why the content of these kinds of duties—moral and legal—will often differ. Yet to appreciate this gap is not to deny that it is often the case that the law of tort contains moral concepts that judges are required to deploy sensitively in articulating the content of the legal obligations within tort law.

*C. Tort Law as Case Law Pertaining to Liability, Not Statutory Directives*

Two structural features of tort law present what some scholars consider to be the greatest obstacle to understanding tort in terms of legal obligations of conduct. Insofar as tort law is a creation or issuance of governmental authorities, it consists of individual decisions rendered by judicial actors on the occasion of particular cases, not authoritative directives of conduct set forth by a legislative- or executive-branch actor. And the decisions in question overwhelmingly concern whether someone is to be held liable to another, *ex post*, for damages. Because tort takes the form not of forward-looking legislation or regulation, but of backward-looking attributions of liability by judges and jurors, tort law seems to some to be ineligible for treatment as a home for primary rules of conduct. Because Hart's analysis of legal obligations of conduct turns on the idea that there exists a valid primary rule of conduct within the law, it seems to follow that tort law cannot be about legal obligations of conduct.

It will be useful, initially, to split this concern into two: the first being labeled the "judicial actor" objection, and the second being the "liability rule" objection. Let us begin with the judicial actor objection, which challenges the possibility of a Hartian theory of legal duty in tort on the ground that tort is largely a judge-made form of law. This concern confuses two aspects of Hart's positivism: his identification of primary rules of conduct as a form of law, and his penchant for selecting examples of legislative processes as those which would satisfy a rule of change or rule of recognition in a modern municipal system. It was, in fact, entirely open to Hart to think that there are precedent-based or custom-based criteria for law, at least with regard to subject areas that have predominantly been governed by a common law system, such as tort. Indeed, there is plenty of evidence that this is what Hart did believe.<sup>76</sup> There is therefore no reason to think the judicial source of tort law undermines the possibility that it contains primary rules of conduct. For example, when a court states that product manufacturers must give consumers adequate warnings of the nature, severity, and likelihood of significant product risks, it is rather obviously recognizing a primary rule of conduct in the law of torts.

The "liability rule" objection states that what courts actually do in tort cases is recognize and apply rules governing who should have to pay for which injuries. In Hartian terms, one might say that courts in these cases recognize power-conferring rules that give plaintiffs the ability to exact

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76. See Hart, *supra* note 6, at 97.

damages from tortfeasors. Or, if one wishes to use the idea of “duty-imposing rules,” one might say that courts are not imposing duties upon individuals requiring them to act or forbear from acting in certain ways, but instead are imposing duties on persons to pay for others’ losses whenever certain conditions have been met. In either case, the courts are not recognizing primary rules of conduct enjoining non-tortious conduct. If tort is about rules of conduct at all, it is about rules enjoining the payment of damages.

This objection lets the tail of the theory wag the dog of the phenomena being theorized. Quite plainly, courts imposing liability typically describe the conduct the defendant has engaged in, and then classify the conduct as tortious by articulating a tort—a legal wrong—that has been done. In so doing, they are saying that a kind of conduct between people—negligently injuring, defrauding, battering, defaming, etc.—is enjoined by the law; it is not-to-be-done. And it is not simply that courts *say* these things. The identification of the legal wrong and the classification of that conduct as a legal wrong are stated and relied upon as the *grounds* of the liability imposition. Indeed, even in our post-writ system, a demand for liability in a complaint must be attached to a count that alleges that one or another tort has been done, and a judgment must be linked to a verdict, which must be rendered as to a particular tort.

As to a certain cluster of positivists, this argument may not quite be enough. Thus, scholars from Holmes to Hans Kelsen to Richard Posner might acknowledge that tort law categorizes conduct into discrete wrongs and conditions liability on a determination as to whether any such conduct has occurred. But, they would argue, the genuine legal rules of tort law are not rules that tell actors ways in which they ought not to behave. Rather, the genuine legal rules of tort are directed to the courts, instructing them to impose liability where the conduct has been engaged in and has produced damages.<sup>77</sup> The courts individually impose liability and infer the liability imposition from a rule, but the rule is a liability-imposing rule. Thus, according to the likes of Posner, it does not suffice to establish that tort law contains primary rules of conduct merely to show that tort conditions liability on conduct that—as a moral and customary matter—is regarded as “wrongful.” There is no separate body or power, in this picture, that actually enjoins the conduct, above and beyond using its occurrence or nonoccurrence as a condition of liability. What is missing is the issuance of a standing injunctive prohibition of citizen conduct, by the sovereign (through some mechanism). (Although Austin, the preeminent “command” theorist, himself embraced the idea of judicial lawmaking through a delegation from the sovereign, the difficult fit of common law adjudication into this essentially legislative conception of lawmaking is partly what led Holmes to reject Austin’s account of common law.)

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77. See *id.* at 39–42 (identifying and responding to this sort of objection as to criminal law).

Whether Hart personally was this kind of positivist, deep down, we cannot say. What we can say, however, is that he placed the refutation of the command theory of positivism near the top of his philosophical agenda, and that his means of doing so makes room for a sufficiently broad approach to the existence of legal rules to permit us to avoid the foregoing problem. Assuming for the moment that Hart believed that the status of the law in a modern legal system was dependent on compliance with conventionally accepted secondary legal rules that typically used social facts as their predicates (even if sometimes drawing upon moral predicates), the failure of primary rules of conduct that are uttered by courts to be issued prospectively as commands does not disqualify them for law, on Hart's account. Indeed, Hart's rejection of this supposed entailment is characteristic of his treatment of a wide variety of legal rules. And it is in part the democracy-enshrining aspect of his entire theory that the status of law does not depend on the issuance of an imperative within a power relation any more than it depends on a connection with human nature or God's will. In this respect, Hart's theory is fundamentally receptive to the existence of primary rules of conduct within the common law.

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Our concern in this section has been to respond to and refute a set of tort-centered objections to the idea that a meaningful notion of obligation resides at the heart of our tort law. As a result we have not focused on the positive case to be made for a duty-based view of tort, in part because we have made that case elsewhere.<sup>78</sup> Suffice it to say that, in our view, the interpretive case for understanding tort law as a law of private wrongs built on relational duties of conduct is overwhelming. Tort law was understood to be such a law by the common lawyers, by Locke, by Blackstone, and by leading early American commentators including Nathan Dane, Zephaniah Swift, and Simon Greenleaf. The classic tort opinions that still appear regularly in American torts casebooks bespeak a commitment to this view. Although Holmesians have had a profound influence on the law of some states, including, most notably, California, the non-Holmesian view remains deeply embedded in current doctrine.<sup>79</sup> More generally, adopting a conception of tort as a law of wrongs allows one to see that tort, notwithstanding all of its complexities, hangs together as a body of law rather than consisting of an ad hoc assemblage of cases driven by individual judges' or commentators' sense of which sorts of decisions promote one or more of a grab-bag of policy objectives. It also allows one to see why tort law has a distinctive role to play in our legal system, as opposed to being

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78. See *supra* note 60 (citing other writings).

79. See John C.P. Goldberg & Benjamin C. Zipursky, *Shielding Duty: How Attending to Assumption of Risk, Attractive Nuisance, and Other "Quaint" Doctrines Can Improve Judicial Decisionmaking in Negligence Cases*, 79 S. Cal. L. Rev. 329, 329-35 (2006) (outlining California's approach to duty).

merely vestigial. Finally, our conception of tort identifies a set of unique social and political functions that tort law actually is designed to serve, which in turn enables us to ask and hopefully answer hard questions about whether, in this day and age, we still think it important that a facet of the legal system empower victims of conduct that is wrongful as to them to respond to the perpetrators of such conduct by means of a lawsuit.

#### CONCLUSION

We have argued in this essay that mainstream tort scholars' attraction to Holmesian jurisprudence is understandable but ultimately unmotivated and wrongheaded. One can share, as we do, Holmes's sense that, notwithstanding its obvious connections to moral norms, tort law really is a distinctive enterprise. One can also share, as we do, his belief that tort law is "created" rather than found in nature, and that its content has changed and will continue to change along with changes in the economic, intellectual, political, and social environment in which tort operates. And yet none of this entails that tort law is a law of liability rules, or that it is whatever judges say it is, or that it is what the occasion demands. The falsity of these sorts of supposed entailments was exactly what Hart set out to establish at a general or jurisprudential level. Thus, we have fastened on his response to Holmes's theory of law as a way of articulating our own responses to Holmesian accounts of tort law. Tort law is not a law of liability rules, nor is it an exercise in social engineering. It is a law of genuine duties of conduct. In this respect, we are fully on board with Hart as against Holmes.

In responding to the likes of Holmes and Austin, Hart seemed to have been moved equally by a desire to give law more credit as a partly autonomous social practice than did certain skeptics, and to endow it with less majesty than might a certain kind of natural lawyer. Our goals are very much the same. We have sought here and elsewhere to make sense of tort law on its own terms, rather than to reduce it to other terms that some have supposed to be more "real" or fundamental, or to fall back on facile claims that tort law's complexities render it incoherent. And we have done so not to valorize tort law, but to provide a basis for making sound judgments about which aspects of it are worth keeping and which are not.

## *Notes & Observations*